In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 382

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF T. N. PLUMBING & HEATING CO., PETITIONER

v.

AMERICAN FIRE & CASUALTY COMPANY AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6–A15) is reported at 423 F. 2d 580. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1970 (Pet. App. A6). Petitions for rehearing and for rehearing en banc were denied April 13, 1970 (Pet. App. A16). The petition for a writ of certiorari was filed on July 13, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly dismissed petitioner's counterclaim and rejected its defense to the government's claim for unpaid withholding taxes.

STATEMENT

Petitioner, a subcontractor on a government construction job, brought suit in January 1965 against the prime contractor and its surety under the Miller Act (40 U.S.C. 270a *et seq.*) for labor and materials furnished (R. 1–44; Pet. 5; Pet. App. A6–A7.)[1] The government intervened to assert a claim against petitioner for unpaid withholding taxes (R. 359–366). In its amended answer to the government's complaint in intervention, petitioner alleged, by way of defense (estoppel) and setoff and counterclaim, that the improper preparation by the government of plans and specifications for the job had required it to spend sums for labor which would not have been required if the plans and specifications had been correct (R. 640–642; Appendix, *infra*, pp. 7–9).

Following dismissal on the government's motion of petitioner's alleged setoff and counterclaim, the district court granted summary judgment for the government on its tax claim (Pet. App. A4–A5). The court of appeals affirmed, holding that there was no dispute as to the withholding taxes due the government and that

[1] "R." references refer to the record filed with the court of appeals, which has been forwarded to this Court in connection with the separate petition for certiorari filed by the prime contractor in *Fryd Construction Corp. and Travelers Indemnity Co. v. T/N Plumbing and Heating Co.* No. 193, this Term.

the counterclaim did not constitute a proper defense because petitioner was not privy to the contract between the government and the prime contractor and thus could not have brought an original suit against the government (Pet. App. A15).

ARGUMENT

The decision below is correct and there is no conflict of decisions or any other reason for further review.

Petitioner argues that (a) the court of appeals has passed on an important question under the Federal Tort Claims Act (28 U.S.C. 2671 *et seq.*) which has not been, but should be, settled by this Court, viz.: whether the Act permits a subcontractor on a government job to assert tort claims against the government in connection with the performance of the job (Pet. 8–12) and that (b) the decision below is in conflict with decisions of other courts of appeals (Pet. 13–14). We submit that the question whether—or how—subcontractors may assert tort claims against the government was neither presented to nor considered by the court below and that there is consequently no occasion for this Court to pass on the question sought to be presented by the petitioner.

1. Rule 8(a) of the Federal Rules of Civil Procedure provides that a pleading which sets forth a counterclaim shall state the basis of the court's jurisdiction unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it. Petitioner's amended answer (Appendix, *infra*, pp. 7–9), in which its counterclaim is set forth, neither

makes any statement as to the source of the court's jurisdiction over the counterclaim nor mentions the Federal Tort Claims Act. Nor did petitioner rely on the Federal Tort Claims Act in the court of appeals. It was, therefore, proper for the court of appeals to assume, as it evidently did, that petitioner relied on the Miller Act (40 U.S.C. 270b (b)), the jurisdictional basis of the main action in which the government had intervened. Accordingly, the court of appeals did not consider any question under the Tort Claims Act or cite any cases decided under that Act. Its statement that petitioner "could not have brought an original suit against the United States * * *" (Pet. App. A15) is properly understood, in context, to mean only that petitioner had no contract claim against the government under the Miller Act—a proposition which petitioner now accepts (Pet. 8–9). Accordingly, no question under the Tort Claims Act is properly before this Court.

2. Moreover, petitioner may not now present to this Court, as it seeks to do (Pet. 3), any question as to the propriety of its setoff and counterclaim, whether founded in contract or tort. In its petition to the court of appeals for rehearing, petitioner's sole point with respect to the summary judgment granted the government was that the court of appeals mistakenly assumed that petitioner was relying on its counterclaim when, in fact, it was relying only on the defense of estoppel and had not appealed from the dismisal of its counterclaim (Appendix, *infra*, pp. 11–12). Having abandoned its counterclaim in the court of appeals, petitioner may not resurrect it in this Court.

3. In any event the counterclaim was properly dismissed, even if treated as predicated on the Federal Tort Claims Act, since such a claim was barred by the statute of limitations when first asserted in petitioner's amended answer in March 1968 (R. 639–647). Petitioner's claim against the government had already accrued, if at all, by the time its main action against the prime contractor was instituted on January 4, 1965 (R. 1–44). This is evident from the fact that petitioner's complaint against the prime contractor, like its claim against the government, is predicated on work required because "of the existence of * * * undisclosed interferences and obstructions" (Pet. 6; Pet. App. A7; Appendix, *infra*, pp. 8–9). Accordingly, the two-year statute of limitations provided in the Federal Tort Claims Act (28 U.S.C. 2401(b)) had already run when petitioner first asserted its counterclaim in March 1968.[2] Petitioner cannot avoid the limitations bar on the theory that it merely seeks recoupment (*Bull v. United States*, 295 U.S. 247), since the government's tax claim is obviously different in character and origin from petitioner's claim.

[2] Although the statute of limitations is not made a ground of the government's motion to dismiss, that defense may be raised by the government if a reply to the counterclaim becomes necessary. Rule 12, Fed. R. Civ. P.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
WILLIAM MASSAR,
RICHARD HALBERSTEIN,
Attorneys.

AUGUST 1970.

Appendix

In the U.S. Dist. Court in and for the Southern District of Florida, Miami Division No. 65–153–CIV–EC

United States of America for the use and benefit of T/N Plumbing & Heating Co., plaintiff

vs.

Fryd Construction Corporation, a Florida corporation, et al., defendants

American Fire & Casualty Company, a Florida corporation, intervenor

Amended Answer

Comes Now the Use Plaintiff, T/N Plumbing & Heating Co., by and through its undersigned attorney, and for its Answer to that Complaint in Intervention filed by the United States of America:

1. Denies each allegation of Paragraphs I through VII, IX and X and demands strict proof thereof.

2. Admits the allegations of Paragraph VIII.

3. Says that the said Intervenor is estopped to assert its claim herein for that said Intervenor did prepare improper plans and specifications for the drainage structures contract as described in Use Plaintiff's complaint herein; and that as a direct and proximate result of the Intervenor's said act, obstructions were incorrectly shown or not shown at all, which obstruc-

tions occasioned those costs incurred by the Use Plaintiff for which the Intervenor seeks recovery.

Wherefore, having answered same, Use Plaintiff prays:

A. That said Complaint in Intervention be dismissed with prejudice to the Intervenor.

B. Should the Court assume jurisdiction, trial by jury may be had upon all issues so triable.

SET-OFF AND COUNTERCLAIM

Comes Now the Use Plaintiff, T/N Plumbing & Heating Co., by and through its undersigned attorney, and files its Set-Off and Counterclaim as to the United States of America, one of the Intervenors herein, and alleges:

1. That the said Intervenor has sued the Use Plaintiff by its Complaint in Intervention for withholding taxes in the sum of $23,320.98.

2. That the said Intervenor improperly prepared plans and specifications for use by the Use Plaintiff in the performance of that contract which is the subject matter of the Use Plaintiff's Complaint herein.

3. That as a direct result of said improper preparation, obstructions were either not shown or incorrectly shown upon said plans so that the Use Plaintiff was required to expend substantial sums for labor, which sums would not otherwise been incurred but for the aforesaid acts of the Intervenor.

4. That the Use Plaintiff has not been paid for the labor for which it paid for the overcoming of said obstructions.

5. That as a direct result of the Intervenor's said acts, Use Plaintiff is entitled to set-off against the claims of the Intervenor for all labor costs incurred by the Use Plaintiff.

Wherefore, Use Plaintiff, T/N Plumbing & Heating Co., sues the Intervenor, United States of America, and demands judgment for compensatory damages in a sum in excess of $10,000.00, together with interest thereon, and Use Plaintiff demands trial by jury upon any issues so triable.

HUGH S. GLICKSTEIN,
Attorney for Use Plaintiff.

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF T/N PLUMBING & HEATING CO., PLAINTIFF-APPELLANT

vs.

FRYD CONSTRUCTION CORPORATION, A FLORIDA CORPORATION, ET AL., DEFENDANTS-APPELLEES

AMERICAN FIRE & CASUALTY COMPANY, A FLORIDA CORPORATION, AND UNITED STATES OF AMERICA, INTERVENORS-APPELLEES

NO. 27437—PETITION FOR REHEARING AS TO INTERVENORS

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

United States of America for the use and benefit of T/N Plumbing & Heating Co., the Plaintiff-Appel-

lant above named, presents this, its Petition for a rehearing as to the Intervenors-Appellees, American Fire & Casualty Company and United States of America, and in support thereof respectfully shows:

1. The Court erred in resolving genuine issues of fact upon the following issues with respect to the Intervenor, American Fire & Casualty Company:

A. Whether the Intervenor had the right to step into the shoes of the Plaintiff.

B. Whether the acts of the Intervenor made it impossible for the Plaintiff to pay its materialmen.

C. Whether any attorneys fees were necessarily incurred by the Intervenor.

D. Whether the Plaintiff was entitled to a jury trial upon the issue of the reasonableness of the Intervenor's attorneys' fees.

In this regard, this Honorable Court resolved issues of fact as the lower Court had done. The maximum liability of the Intervenor was $26,456.00. As shown in Plaintiff's Brief (p. 52), the Defendant General Contractor was holding more than enough to indemnify the surety completely. The Plaintiff is entitled to have a jury determine whether its surety was entitled to step into the shoes of the Plaintiff—not to complete the contract—but to pay the materialmen with funds being withheld by the Defendant General Contractor. Why must the Plaintiff in this case be precluded, on the record below from showing to a jury that the surety was not entitled to push the Plaintiff aside, collect money from the Defendant General Contractor, distribute it to the materialmen and be paid attorney's

fees equal to approximately one-third of its total liability on the payment bond? This Court's decision concludes as a matter of law that the record shows without contradiction the absolute right of the surety here to shove the Plaintiff aside. The Plaintiff submits that the record shows clear and competent evidence that its materialmen were co-operating with the Plaintiff in receiving their money until the surety came into the picture and refused to step out. From that time forward, between the acts of the surety and the tax collecting arm of the Government, the Plaintiff has been helplessly caught in a morass of confusion. Only the Plaintiff tried to create some order by having the lower court resolve—once and for all—whether the surety or the government or the Plaintiff was entitled to funds being held by the general contractor. The surety refused to take the first step toward resolving the priority but lay back while the Plaintiff pursued its action below, then claimed successfully the right to all of its claim and a substantial sum for its attorneys.

This Court overlooked the law of Florida that the surety's attorney must prove the reasonableness of his fees to a jury. *Sork* v. *United Benefit Life Insurance Company,* Fla. App. 1964, 161 So. 2d 54, 56; *Reiss* v. *Goldman,* Fla. App. 1967, 196 So. 2d 184.

2. The Court erred in considering that the Plaintiff was relying upon its Counterclaim against the Government, when in fact the Plaintiff was relying only upon the defense of estoppel raised in its Amended Answer.

The Plaintiff would show that it never requested that its Counterclaim be included in the record on ap-

peal. The Plaintiff's Counterclaim was dismissed and the Plaintiff did not appeal such ruling.

The Plaintiff's Brief never mentioned the Counterclaim or setoff. It dealt solely and exclusively with its Amended Answer which raised the defense of estoppel. The Point which discusses this matter appears on page 60 of the Brief and states:

> "The Court deprived T/N of its right to trial by jury upon the issue of estoppel raised by T/N's Amended Answer to the Government's complaint for taxes.

The Government has confused this record by adding the Counterclaim. Now, the Plaintiff must be penalized—again—for the Government's misadventures.

As argued in the Plaintiff's Brief, the Plaintiff was entitled to be heard upon its defense of estoppel. *U.S.* v. *Continental Casualty Company*, D.C.N.Y. 1962, 210 F. Supp. 433, 436.

The Government had led this Court into error.

HUGH S. GLICKSTEIN,
Attorney for Appellant-Plaintiff.

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